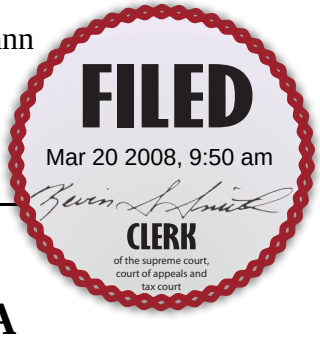
ATTORNEY FOR APPELLANT:

WILLIAM KVAS
Hunegs, LeNeave & Kvas, P.A.
Minneapolis, Minnesota

ATTORNEY FOR APPELLEE:

ROBERT A. WELSH
Harris Welsh & Lukmann
Chesterton, Indiana



IN THE
COURT OF APPEALS OF INDIANA

CLARENCE E. LOWE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 64A05-0708-CV-434
	)	
NORTHERN INDIANA COMMUTER TRANSPORTATION,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0410-CT-8924

March 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Clarence E. Lowe appeals the trial court's grant of summary judgment to the Northern Indiana Commuter Transportation District (the "NICTD") on his complaint for damages under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (2007) ("FELA"). Lowe raises one issue for our review, but we address only the dispositive issue of whether this court has jurisdiction over Lowe's purported appeal.

We dismiss.

FACTS AND PROCEDURAL HISTORY

On July 13, 2004, Lowe filed an amended complaint alleging that he had suffered personal injuries while employed as a trackman by the NICTD. Lowe sought relief under FELA for injuries suffered on three occasions, namely, on October 19, 1999, August 16, 2002, and December 7, 2002. Lowe gave the NICTD written notice of the August 16, 2002, incident shortly after its occurrence, but he did not give the NICTD written notice of either the October 19, 1999, incident or the December 7, 2002, incident.

In response to the complaint, the NICTD asserted, among other things, that it was entitled to dismissal under the doctrine of sovereign immunity, except as provided by the Indiana Tort Claims Act. On June 21, 2007, the trial court entered its Second Amended Order, in which it partially granted the NICTD's request for summary judgment. Specifically, the court granted the NICTD's motion on the two claims for which Lowe did not give the NICTD written notice and denied the NICTD's motion on the August 16, 2002, claim. This appeal ensued.

DISCUSSION AND DECISION

On appeal, the parties dispute whether Indiana Code Section 8-5-15-17[1] provides a waiver of the State's[2] sovereign immunity with respect to FELA actions. In particular, Lowe argues that that statute's language is "unmistakably clear . . . that the State waives its qualified sovereign immunity" with respect to his FELA claims. Appellant's Brief at 10 (emphasis removed). In response, the NICTD asserts that that statute does not unequivocally waive the State's sovereign immunity. However, we do not reach the

---

[1] Indiana Code Section 8-5-15-17, part of Indiana's regulation of commuter transportation districts and entitled "Protection of system employees," states:

> If the district acquires a commuter railroad transportation system and proceeds to operate the system directly, by management contract, or by lease under this chapter, the employees of the system shall be protected as follows:
>
> > (1) The employees of the system must be retained to the fullest extent consistent with sound management, and those terminated or laid off must be assured priority of reemployment.
> >
> > (2) The rights, privileges, and benefits of the employees under any pension or retirement plan are not affected, and the board shall assume the duties of the system under the plan.
> >
> > (3) The board shall act in such a manner as to insure the continuing applicability to affected railroad employees of the provisions of all federal statutes applicable to them prior to April 1, 1984, and a continuation of their collective bargaining agreements until the provisions of those agreements can be renegotiated by representatives of the board and the representatives of those employees duly designated pursuant to terms and provisions of the federal Railway Labor Act (45 U.S.C. 151 et seq.).
> >
> > (4) The employees of the system shall receive protection no less favorable than the employee conditions provided In the Matter of the New York Dock (360 I.C.C. 60), and no person with an employment relation with the commuter transportation system on April 1, 1984, may be deprived of employment or placed in a worse position by reason of the district's acquisition of a commuter transportation system.

(Emphasis added.)

[2] The NICTD is a state agency. See Oshinski v. N. Ind. Commuter Transp. Dist., 843 N.E.2d 536, 537 (Ind. Ct. App. 2006).

issues raised on appeal as we are without jurisdiction to do so. See Anonymous Doctor A v. Sherrard, 783 N.E.2d 296, 297 (Ind. Ct. App. 2003) ("Although the parties' briefs do not address the matter, we have a continuing duty to take notice of our lack of jurisdiction.").

Although Lowe characterizes his appeal as "pursuant to Indiana Appellate Rule 5(A)," Appellant's Brief at 3, which pertains to final judgments, in fact Lowe appeals from the trial court's partial grant of summary judgment to the NICTD. Indiana Trial Rule 56(C) provides that:

> A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.

Here, the trial court neither expressly determined that "there is no just reason for delay" nor directed "entry of judgment" on the two claims on which it granted the NICTD's motion for summary judgment. See Ind. Trial Rule 56(C); Appellant's App. at 20. Thus, the trial court's partial grant of summary judgment remains interlocutory. See Ramierez v. Am. Fam. Mut. Ins. Co., 652 N.E.2d 511, 514 (Ind. Ct. App. 1995). And as the party seeking review of the court's interlocutory order, Lowe was required to seek certification of that order in accordance with Indiana Appellate Rule 14(B).[3] See Anonymous Doctor A, 783 N.E.2d at 299.

[3] Appellate Rule 14(B) states: "An appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." The rule further provides that "the motion requesting that the Court of Appeals accept jurisdiction over an interlocutory appeal shall be filed within thirty (30) days of the date of the trial court's certification." App. R. 14(B)(2)(a).

On February 8, 2008, this court issued an order for Lowe to show cause as to why this appeal should not be dismissed for lack of jurisdiction. Specifically, we noted as follows:

> It has come to the attention of this Court that the Appellant appears to have initiated an appeal from an interlocutory order without: obtaining certification of the interlocutory order, demonstrating that the interlocutory appeal may be taken as a matter of right, or demonstrating that the appeal is from a final, appealable order. See Ramco Indus., Inc. v. C & E Corp., 773 N.E.2d 284, 288 (Ind. Ct. App. 2002) (explaining Trial Rules 56(C) and 54(B) allow trial courts to certify interlocutory orders as final, appealable orders if the court includes "magic language" that there is no just reason for delay and directs entry of judgment).

Lowe v. N. Ind. Commuter Transp. Dist., No. 64A05-0708-CV-434 (Ind. Ct. App. Feb. 8, 2008) (order for appellant to show cause). And on February 20, Lowe's local counsel submitted the following in response:

> Mr. Lowe proceeded under [Appellate] Rule 5(A)[, pertaining to final judgments,] rather than Rule 5(B)[, directing appeals of interlocutory orders to proceed under Rule 14,] on the basis that in the event the trial court's multiple orders, including its Second Amended Order, should be interpreted as a final adjudication of all claims, he has preserved his right to appeal the trial court's decisions granting summary judgment. On the other hand, if the trial court's multiple orders should be interpreted as only a partial adjudication and this Court has no jurisdiction in this appeal, Mr. Lowe preserves his right to appeal the trial court's granting summary judgment at the time when his entire case is disposed of by the trial court. Accordingly, Mr. Lowe pursues this appeal to ensure that he did not waive his right to appeal should the former interpretation be placed on the trial court's orders.

Id. (February 20, 2008) (appellant's response to court's order dated February 8, 2008).

As discussed above, Lowe's appeal is from the grant of a partial summary judgment. The trial court has not certified its Second Amended Order for appeal under Appellate Rule 14(B). Thus, this court is without jurisdiction to hear Lowe's purported appeal.

Dismissed.

BAILEY, J., and CRONE, J., concur.